Issue VI-I(N) (Assurance Of Payment)

The Commission should reject Verizon's proposed "Assurance of Payment" provisions, which would obligate WorldCom, upon a request by Verizon, to provide Verizon with adequate assurance of payment of amounts due (or to become due) to Verizon and would give Verizon the right to suspend its performance obligations under the agreement if WorldCom fails to take the precise assurance of payment measures set forth in Section 6. As explained below, Verizon's proposed assurance of payment language goes beyond the requirements of the Act, is unduly onerous, and gives Verizon the power to impose an unduly draconian remedy – suspension of service – for any concerns it may have regarding WorldCom's financial status. Therefore, the Commission should decline to order inclusion of Verizon's proposed Section 6.

At the outset, the Commission should reject the assurance of payment provision because it is unnecessary. Verizon has conceded that it does not need an "assurance of payment" from WorldCom, and that its concerns are with other CLECs who might opt in to the interconnection agreement (and who Verizon presumably fears are less financially stable than WorldCom). See Verizon Exh. 13, Direct Test. General Terms and Conditions at 38. Although Verizon has indicated that it would be willing to write a letter exempting WorldCom from this requirement, Verizon has not indicated how such a letter would exempt WorldCom from an "assurance of payment," and the use of such a letter would pose significant problems. It would be inappropriate to enter into a "side-arrangement" to waive the application of certain terms of the interconnection agreement. Such a "side-arrangement" might not exempt WorldCom's subsidiaries and affiliates from the assurance of payment provision, and those entities should not be subjected to

Verizon's unreasonable requirement. See id. More globally, such "side-arrangements" might lead to discriminatory treatment of other CLECs, which would be contrary to the Act's pro-competitive purposes. See id.

Second, Verizon's proposed Section 6 goes well beyond the requirements of the 1996 Act. Nothing in the Act requires CLECs to provide the demonstration of financial stability that Verizon seeks here. See WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 61. To our knowledge, WorldCom has not arbitrated this issue in other jurisdictions.

In addition, Verizon's proposed Section 6 is "heavy-handed and unduly onerous." WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 61. Under Verizon's proposal, Verizon may require WorldCom to take certain prescribed steps (including providing a cash security deposit or letter of credit) to convince Verizon that WorldCom is able to meet its payment obligations whenever Verizon deems such measures to be necessary. See id. These demonstrations of creditworthiness could be triggered by "minor occurrences," such as a failure to timely pay a bill. Id. at 62. There is simply no reason to accord Verizon unfettered authority to make such intrusive requests. See id.

Moreover, the remedy that Verizon has proposed is "an unjustified and draconian response to any concerns Verizon might have about WorldCom's ability to meet its payment obligations." Id. The suspension of service would have "wide ranging negative effects," including the disruption of service to WorldCom's customers, and the resulting irreparable damage to WorldCom's customers' goodwill towards WorldCom. See id.

Verizon could certainly employ less drastic remedies if it had legitimate concerns that a CLEC was unable to meet its payment obligations. See id.

Finally, even if it were appropriate to include an assurance of payment provision in the interconnection agreement, fairness would require that the provision give the carriers a reciprocal right to request such assurances. As explained by WorldCom's witnesses, "Verizon provides no explanation, nor could it, for why it should be entitled to request assurance of payment from WorldCom, but WorldCom should be denied the reciprocal right to request the same assurances from Verizon." Id. at 62. Therefore, although WorldCom does not agree that an assurance of payment provision is necessary, if the Commission accepts Verizon's proposal to include such language WorldCom respectfully requests that the provision, at a minimum, impose reciprocal obligations and confer reciprocal rights on the parties. See WorldCom Exh. 32, Rebuttal Test. of Harthun, Trofimuk, and Roscoe at 33.

Issue VI-1(O) (Default)

The Commission should reject Verizon's proposed Section 12, which provides that, where either party fails to make a payment required by the Interconnection Agreement or materially breaches any other material provision of the Interconnection Agreement, and such failure or breach continues for 30 days after written notice of the breach has been provided to the breaching party, the non-defaulting party may, by written notice to the defaulting party, (a) suspend the provision of any or all services under the Parties' agreement or (b) cancel the agreement and terminate the provision of all services under the agreement. As explained below (and discussed above under Issue VI-1(N)), Verizon should not be given a unilateral right to suspend or terminate service because such actions would be contrary to the Act and would adversely affect the carriers and their customers. If the Commission determines that the interconnection agreement should contain a default provision, WorldCom requests that the Commission adopt the language proposed in WorldCom's testimony, which is more reasonable than Verizon's proposal.

At the outset, as was true of the assurance of payment provision, Verizon has conceded that "its concerns are not with WorldCom, but with less financially stable CLECs." Verizon Exh. 13, Direct Test. General Terms and Conditions at 39. Accordingly, Verizon has indicated that it would be willing to use alternative dispute resolution, as opposed to its proposed right to terminate or suspend service, with carriers whose net worth exceeds $100 million. See id. Although WorldCom has attempted to negotiate agreeable "carve-out" language to implement this exception, WorldCom "must be able to ensure that all of its subsidiaries and affiliates will be able to take advantage of this agreement without being burdened by unreasonable requirements such as the

proposed Default provisions." WorldCom Exh. 32, Rebuttal Test. of Harthun, Trofimuk, and Roscoe at 35.

In addition to being unnecessary, Verizon's proposed self-help remedy is unlawful. The Act requires Verizon to provide certain services and allow WorldCom to interconnect with its network. See 47 U.S.C. §§ 251, 252. Verizon has not identified any section of the Act, nor can it, that suspends all of those obligations in the event that Verizon believes WorldCom has breached the agreement with respect to one or more services. Moreover, as discussed above, the suspension or termination of service is enormously disruptive to WorldCom's relationship with its customers, and is therefore inconsistent with the purposes of the Act. See Issue VI-1(N), supra.

Instead, the parties should resolve all contractual disputes and situations of alleged uncured default on a case by case basis pursuant to the dispute resolution procedures proposed in WorldCom's Issues IV-100 and IV-101. See WorldCom Exh. 21, Direct Testimony of Harthun, Trofimuk, and Roscoe at 65. As explained by WorldCom's witnesses, such proceedings would allow the parties to raise the question of termination or suspension of service in the event of default "as it relates to the facts of that particular case." Id. This approach is more reasonable than permitting Verizon to use a default regarding one service as justification to terminate the entire Agreement and all other services provided under the Agreement. Moreover, third-party resolution of the disputes regarding default and suspension or termination serves the public interest. The neutrality of the Commission or mediator/arbitrator will ensure that the impact of termination or suspension of service is given adequate weight. See id. Placing the issue before an unbiased body is particularly appropriate given that "Verizon has significant

incentives to disrupt WorldCom's relationships with it customers in order to win back market share in the local telecommunications marketplace. This gives Verizon the incentive to find default and push to discontinue service more rapidly than in other commercial settings." Id.

Although WorldCom objects to the inclusion of a default provision, if the Commission determines that such a provision should be included in the agreement, WorldCom requests that the Commission adopt the language offered in WorldCom's testimony. See WorldCom Exh. 21, Direct Testimony of Harthun, Trofimuk, and Roscoe at 65. WorldCom's proposed language incorporates the dispute resolution process to which the parties have already agreed in Issue IV-100 and that is subject to resolution in Issue-101, and "avoids the drastic measures of suspension or termination of all the services provided under the Agreement." Id.

Issue VI-1(P) (Discontinuance Of Service)

The Commission should reject Verizon's proposal that the Interconnection Agreement contain provisions that would require WorldCom to send specific written notice to Verizon, the Commission, and WorldCom customers if WorldCom intends to discontinue service, establishes the terms and contents of the notice that WorldCom provides to its customers, and would require WorldCom to provide billing, subscription, and other customer information to Verizon for those customers whose service would be discontinued. At the outset, Verizon's proposal creates anti-competitive results because it would make Verizon privy to information of which other carriers would have no knowledge – namely WorldCom's intent to discontinue service. See WorldCom Exh. 16, Direct Test. of Harthun at 8. Similarly, by requiring WorldCom to give Verizon its customer billing, service, and other information, Verizon's proposal gives Verizon an unfair advantage over other carriers in the marketplace. See id. In addition, Verizon's proposal that it be allowed to define the manner in which WorldCom notifies its customers of its intent to discontinue service "impermissibly infringes upon the relationship between WorldCom and its customers." Id. Finally, as discussed above, the language preserving Verizon's right to suspend or cancel service inappropriately gives Verizon the power to unilaterally nullify the requirements of the interconnection agreement. See WorldCom Exh. 16, Direct Test. of M. Harthun at 10.

First, it would be inappropriate to give Verizon advance notice of WorldCom's intent to discontinue service because such notice "translates into advance knowledge that WorldCom subscribers are in the market for a new carrier ... and would give Verizon a head start in soliciting former WorldCom subscribers who might otherwise prefer to

obtain services from another CLEC or independent carrier." Id. at 8-9. Verizon could use this knowledge to reach the customers before other carriers were aware of the discontinuance of the customers' service, and thereby improperly attempt to recover or protect its monopoly share of the market. See id. at 9. This type of conduct would violate the pro-competitive goals and spirit of the Act. See id. Although Verizon indicated at the hearings that it is not interested in regaining those customers, see Tr. 10/12/01 at 2136 (Antoniou, Verizon), nothing in the proposed contract language prevents Verizon from engaging in such anti-competitive actions in the event that it develops an interest in the customers.

In addition, requiring WorldCom to give Verizon its customer billing, service, and other information creates an unfair advantage for Verizon. Other carriers must obtain this information from the state of Virginia, and there is no reason to put Verizon in a position superior to that of those carriers. See id. Indeed, the Virginia State Corporation Commission has indicated that it intends to implement a statewide procedure through which competing carriers will be duly notified of discontinued service due to bankruptcy.[112]

Further, Verizon's proposed Sections 13.1 and 13.2 inappropriately purport to define WorldCom's obligations to WorldCom subscribers, and to establish procedures to be taken upon discontinuation of WorldCom's service. Verizon should not be allowed to interfere with WorldCom's relationship with its customers. See WorldCom Exh. 16, Direct Test. of M. Harthun at 9. Procedures and rules affecting that relationship should

[112] See In re Establishing Rule Governing the Discontinuance of Local Exchange Telecommunications Services Provided by Competitive Local Exchange Carriers, Order for Notice and Comment or Requests for Hearing, PUC010128 (Va. Corp. Comm'n June 20, 2001).

be set in WorldCom's tariffs, Virginia law and the VSCC's regulations, and not in an interconnection agreement which governs the carrier-to-carrier relationship between Verizon and WorldCom. See id.

Finally, as discussed elsewhere in this brief, Verizon should not be given the right to unilaterally terminate its service offerings.[113] Giving Verizon such an unfettered right seriously weakens the integrity of the interconnection agreement, and would have grave consequences for WorldCom's customers. See WorldCom Exh. 16, Direct Test. of M. Harthun at 10. Therefore, the Commission should reject Verizon's proposed Section 13.4.

In sum, the Commission should reject Verizon's proposed language and resolve this issue in WorldCom's favor.

[113] See Issue IV-113 (Verizon's counter-proposal would allow it to discontinue providing a service or benefit if it unilaterally concluded that it is no longer required to do so under Applicable Law); see Issue VI-1(O) (Verizon's proposed language would allow it to suspend or terminate the Agreement and provision of the services under the Agreement unilaterally in the event WorldCom is in default for more than 30 days after written notice from Verizon); see generally Issues III-18 and IV-85 (Verizon's counter-proposal would require rates, terms and conditions of the Interconnection Agreement to be superceded by filed tariffs).

Issue VI-1(Q) (Insurance)

The Commission should reject Verizon's insurance proposal, which sets forth WorldCom's insurance obligations and sets the amounts for the liability coverage that WorldCom must hold, for several reasons. At the outset, Verizon has not demonstrated that these provisions are necessary to its relationship with WorldCom, and has conceded that its "concern [on this issue] is not with WorldCom." See Verizon Exh. 13, Direct Test. General Terms and Conditions at 43. In addition, Verizon's proposed language creates unfairly one-sided obligations, rather than mutually requiring the parties to comply with certain insurance requirements. See WorldCom Exh. 16, Direct Test. of M. Harthun at 11. As discussed below, there are also several problems with the specific insurance terms that Verizon has proposed; for example, several of the insurance coverage limits identified in Verizon's proposed language are excessive. See id.. Although WorldCom would prefer that the Commission reject Verizon's proposal in its entirety, if the Commission determines that insurance provisions should be included in the interconnection agreement, it should adopt the alternative language that WorldCom has proposed.

As explained elsewhere in this brief, WorldCom objects to including terms in its interconnection agreement that Verizon has admitted are aimed towards other carriers and are unnecessary for WorldCom. This issue arises again in the context of Verizon's assertion in its direct testimony that it is willing to allow self-insurance for carriers whose net worth exceeds $100 million. See WorldCom Exh. 30, Rebuttal Test. of M. Harthun at 7. Although WorldCom has attempted to work with Verizon to agree on a carve-out provision for carriers with a net worth exceeding $100 million, WorldCom cannot accept

language that would impose these unreasonable insurance requirements on WorldCom's subsidiaries and affiliates. See id. Moreover, WorldCom should not be required to provision its insurance in any particular manner, and should instead retain the flexibility to choose not to self-insure. See id. If the parties cannot resolve this issue prior to the submission of the final briefs, the Commission should not force WorldCom to comply with insurance provisions that "by all accounts, are plainly not appropriate for WorldCom." Id.

Moreover, Verizon's insurance proposal unfairly creates one-sided insurance obligations. As explained by WorldCom's witnesses, "both Verizon and WorldCom will be required to perform tasks that impact the other's equipment, sites, and facilities, [and] each carrier will need protection against any potential loss or damage." WorldCom Exh. 16, Direct Test. of M. Harthun at 11 (emphasis added); see also Tr. 10/12/01 at 2143-44 (Harthun, WorldCom). Accordingly, if the Commission determines that the interconnection agreement should contain a provision addressing the carriers' obligations to carry insurance coverage, that provision should apply to both WorldCom and Verizon. See id.

Further, several of the insurance coverage limits that Verizon has identified are excessive. Section 21.1.1 of Verizon's proposed language should contain a $1 million per-occurrence limit rather than a $2 million per-occurrence limit; Verizon can recover amounts up to its proposed $2 million limit through the umbrella policy (which covers general liability limits in excess of $1 million). See WorldCom Exh. 16, Direct Test. of M. Harthun at 11. In addition, a $5 million umbrella policy limit is more consistent with

industry standards than the "unusually high" $10 million limit that Verizon has proposed in Section 21.1.3. Id.

Verizon's remaining language is also flawed in several ways. Section 21.2's disclosure requirement should be rejected because "[t]he nature and amount of WorldCom's retentions is confidential business information that WorldCom does not disclose, and Verizon has not provided any justification for requesting such information." Id. at 12.[114] Verizon's proposed fourteen day time frame for WorldCom to provide proof of insurance should be replaced with a thirty day period, which is "standard in the industry, and is also the term to which insurance carriers agree." Id. Verizon's proposed Section 21.6 should be deleted because if independent subcontractors fail to maintain insurance and Verizon purchases it, Verizon should seek reimbursement from the subcontractors, and not from WorldCom. See id.

Finally, Verizon's proposed language regarding notice of cancellation of insurance coverage is overly broad. As explained by Mr. Harthun, "the reference to a 'material change' in WorldCom's insurance would require WorldCom to notify Verizon of insurance matters that have no effect on Verizon. For example, although Verizon may have an interest in knowing about reductions in WorldCom's coverage, any increases in coverage would not impact Verizon and thus Verizon has no need or right to be informed of them." Id. at 12. Accordingly, if the Commission determines that the agreement should include insurance provisions, Verizon's proposed language should be amended to

[114] The existence or amount of a deductible would not impact payment of third party claims because WorldCom does not carry self-insured retentions for its insurance coverage. See WorldCom Exh. 16, Direct Test. of M. Harthun at 11.

provide for written notice of "cancellation of insurance, or any reduction in coverage." Id.

In sum, WorldCom requests that the Commission reject Verizon's proposed contract language on insurance. As an alternative, WorldCom has counter-proposed insurance language that it would find acceptable, and that adequately addresses the concerns discussed above. Therefore, if the Commission determines that the Agreement should contain an insurance provision, WorldCom requests that the Commission order inclusion of the insurance provision proposed by WorldCom in its Response to Verizon's Supplemental Issues dated June 18, 2001.

Issue VI-1(R) (References)

Although WorldCom is willing to accept Verizon's proposed Section 35.1, which would define the references made to other provisions within the Interconnection Agreement (including Sections, Appendices and Exhibits) and to sources and authorities outside of it (including Tariffs, other agreements, technical guides and laws), the Commission should reject the portion of Section 35.2 of Verizon's proposed agreement that incorporates subsequent amendments and supplements to those sources. Specifically, the phrase "as amended and supplemented from time to time (and, in the case of a Tariff or provision of Applicable Law, to any successor Tariff or provision)" of Verizon's proposed Section 35.2. introduces "an unworkable degree of uncertainty into the Interconnection Agreement" and improperly supplants the agreement's change-of-law provisions. WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 67.

Verizon's proposed Section 35.2 would "allow the specific terms over which the parties have negotiated (or have been ordered by a commission) to be materially altered by future changes to tariffs, laws, or other authorities and sources, and would improperly allow Verizon (and others) to unilaterally change the terms of the Agreement without reconciling those changes with the terms and provisions over which the parties have deliberated, negotiated and compromised." WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 67. Allowing such future changes to affect the terms of the interconnection agreement improperly introduces uncertainty into the interconnection agreement. See id; see also Issues III-18 and IV-85, supra. Although Verizon suggests in its testimony that the changes are not unilateral, the process that applies to changes to tariffs or other documents can hardly be described as mutual. See WorldCom Exh. 32,

Rebuttal Test. of Harthun, Trofimuk, and Roscoe at 38. WorldCom's witnesses have testified that in their experience, "when Verizon submits a tariff to a commission, it does so of its own choosing without consultation with WorldCom or other CLECs," thereby forcing WorldCom and other CLECs "to engage the issue on Verizon's terms." Id. Further, even the minimal participation that WorldCom has in the tariff process does not apply to changes in the "technical or other document[s] (including Verizon or third party guides, practices, or handbooks)" referenced in Verizon's proposed contract. Id. Changes to such documents could be made "unilaterally, by any number of parties" without WorldCom's knowledge, let alone its participation. See id. Such unilateral action directly conflicts with the collaborative process that generally applies to the negotiation and arbitration of the terms of interconnection agreements. See Issues III-18 and IV-85, supra.

Moreover, Verizon's proposed language would improperly supplant the change-in-law provisions proposed by WorldCom (and agreed to by Verizon) in Issue IV-113, and discussed supra. See Tr. 10/12/01 at 2105-06 ("[T]he change-in-law provision obviates the need for this reference provision.") (Harthun, WorldCom). As explained by WorldCom's witnesses, "WorldCom and Verizon tend to disagree regarding the meaning of the law," and it is therefore appropriate for the parties to use negotiations and arbitrations to resolve "their oft-diverging interpretation of changes or amendments to outside sources." WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 67; see also WorldCom Exh. 32, Rebuttal Test. of Harthun, Trofimuk, and Roscoe at 36. Unlike Verizon's proposed language, the agreement's change-in-law process "allow[s] the parties to assimilate changes in the law and other authorities mutually and promptly

into the Agreement." WorldCom Exh. 32, Rebuttal Test. of Harthun, Trofimuk, and Roscoe at 38. A deliberative process that involves both parties and allows a mutually satisfactory amendment to be incorporated into the Agreement is the proper means of addressing such changes in the legal landscape. See id.

In sum, the Interconnection Agreement should specifically define the references "as they exist at the time that the parties entered into the Agreement to ensure that the Agreement does not become subject to the ebb and flow of the changes caused by the outside references." WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 67. Therefore, WorldCom has proposed that the Commission reject the language discussed above, and substitute the phrase "as of the effective date of the interconnection agreement." See id. This language would remove the uncertainty that would otherwise be caused by reference to future unknown amendments and supplements to the outside authorities and sources, and would eliminate the inconsistency with the change-in-law provisions. See id.

Issue III-15 (Intellectual Property Rights Of Third Parties)

In accordance with this Commission's UNE Licensing Order and Fourth Circuit precedent, the interconnection agreement should provide WorldCom with assurances that Verizon will use its best efforts to provide access to its network, equipment and software on a non-discriminatory basis. See UNE Licensing Order; AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc., 197 F.3d 663, 670 (4th Cir. 1999). Specifically, WorldCom has proposed that the interconnection agreement contain a provision that does three things: require Verizon to use its best efforts in negotiating and renegotiating license rights that allow WorldCom to use third party intellectual property embedded in Verizon's network, enumerates the consequences of Verizon's failure to use its best efforts, and establishes warranties that ensure that Verizon does not intentionally alter existing licensing agreements in order to interfere with WorldCom's use of intellectual property. See WorldCom Exh. 19, Direct Test. of Peterson and Harthun at 4; WorldCom Interconnection Agreement Part A § 20.2. Verizon's assertion that WorldCom's proposed language compels Verizon to go beyond its "best efforts" obligations is incorrect, and Verizon's proposed language fails to adequately address the principles that WorldCom's language implements. See id. at 13-14. Accordingly, the Commission should order the inclusion of WorldCom's proposed Part A § 20.2.

In the UNE Licensing Order, this Commission concluded that "the 'nondiscriminatory access' obligation in section 251(c)(3) requires incumbent LECs to use their best efforts to provide all features and functionalities of each unbundled network element they provide, including any associated intellectual property rights that are necessary for the requesting carrier to use the nework element in the same manner as the

incumbent LEC," and that "[i]n particular, incumbent LECs must exercise their best efforts to obtain co-extensive rights for competing carriers purchasing unbundled nework elements." UNE Licensing Order ¶ 70. As WorldCom's witnesses explained, WorldCom's status as a new entrant in a market that was previously controlled by Verizon puts WorldCom at a competitive disadvantage in obtaining licenses to use the intellectual property embedded in the network. See WorldCom Exh. 31, Rebuttal Test. of Peterson and Harthun at 2-3. Cost and efficency concerns require WorldCom and other CLECs to rely on Verizon's relationships and negotiations with the vendors whose intellectual property is used in the network. See id. Indeed, as this Commission has observed, "incumbent LECs control the choice of third party vendors, the scope of contracts with those vendors, and, along with the vendors, are well-situated to interpret ambiguous portions of those contracts." UNE Licensing Order ¶ 9. It is for this reason that Verizon and other incumbent LECs "are in the best position to determine whether existing contracts permit requesting carriers to use unbundled elements without modifying the contract to permit an extension of the right to use the intellectual property, to renegotiate the existing contracts if an extension is required, and to negotiate future contracts to ensure that competing carriers' use of intellectual property present in an element is contemplated." Id.

WorldCom's proposed language is designed to implement these principles as well as recent legal decisions of the Fourth Circuit. See WorldCom Exh. 16, Direct Test. of Harthun and Peterson at 8. AT&T v. Bell Atlantic Virginia involved an appeal from a VSCC determination that Bell Atlantic's indemnification of WorldCom against third-party claims of infringement should only be prospective from the date of the

Interconnection Agreement, and that such indemnification should not cover all of Verizon's existing plant. On appeal, the Fourth Circuit reversed the state commission's determination and held, consistent with a previous FCC Order on the question,[115] that the Act requires ILECs like Verizon to renegotiate terms of intellectual property licenses when necessary to cover use of Verizon's existing plant by MCI and satisfy the infrastructure sharing requirements of the Act.[116]

WorldCom's proposed indemnification, warranty and notification clauses are a "commercially reasonable means of implementing [the above-referenced] decisions in ways that are highly consistent with customary practices in this area." WorldCom Exh. 16, Direct Test. of Harthun and Peterson at 8. When a party is obligated to negotiate certain license terms under a best efforts test, it is standard business and legal practice to require that party to indemnify the other party against a failure to use its best efforts. See id. Therefore, WorldCom's proposed indemnification language seeks to make the consequences of any failure by Verizon to meet the legal obligations imposed upon it by the UNE Licensing Order "clear, unmistakable and unambiguous." Id. at 10. WorldCom is not requesting that Verizon indemnify it from unsuccessful negotiations, but simply to ensure that Verizon use its "best efforts," as the law requires. See id.; WorldCom Exh. 31, Rebuttal Test. of Harthun and Peterson at 5-6. WorldCom's warranty language simply ensures that Verizon does not intentionally modify existing licensing agreements in order to disqualify MCIm from using or interconnecting with Verizon's network

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[115] See Infrastructure Sharing Order ¶ 70.

[116] See Bell Atlantic-Virginia, 197 F.3d at 670 ("the [1996] Act requires Bell Atlantic to attempt to renegotiate its existing intellectual property licenses to cover use by MCI. ... In those negotiations, Bell Atlantic must exercise its best efforts to obtain licensing for CLECs on the terms that it has obtained for itself.").

equipment and software. See id. at 10. WorldCom's notification language, which requires that WorldCom be notified of any pending or threatened intellectual property claims by third party licensors, is customary, and sensibly implements the UNE Licensing Order and the Fourth Circuit's Decision. See id. In light of the applicable legal requirements, there is no reasonable grounds for Verizon to object to WorldCom's proposed warranty and notification language.

The relationship between WorldCom and Verizon makes it particularly important to create contractual incentives for Verizon to comply with its obligations to use its best efforts to negotiate with its intellectual property vendors, and to specify how that duty will be implemented and the consequences that result from failing to comply with those requirements. Unlike the typical commercial buyer-seller relationship, Verizon's "customer" in this context is a competitor, WorldCom, that is trying to make inroads into a market that Verizon previously dominated. See WorldCom Exh. 16, Direct Test. of Harthun and Peterson at 9. This gives incumbent carriers such as Verizon every incentive to discriminate against the customer-competitor. See Local Competition Order ¶ 307 ("incumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus, have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in many kinds of discrimination."). The risk of discrimination is particularly acute in this context because, as noted above, WorldCom is wholly reliant on Verizon to negotiate on its behalf. See WorldCom Exh. 16, Direct Test. of Harthun and Peterson at 9. As explained by WorldCom's witnesses:

"WorldCom will not be at the negotiation table. In such circumstances, the incumbent will have the incentive not to push its vendor too hard to obtain the requested extension. Because WorldCom will not be present, it will be very difficult for it to ensure that Verizon's "best efforts" are truly that." Id. at 9.

Verizon's assertion that WorldCom's proposed language goes beyond the requirements of applicable law is meritless. See Verizon Exh. 13, Direct Test. General Terms and Conditions at 10. As explained above, WorldCom's Part A Section 20.2 "proposes nothing more than what the FCC and the Fourth Circuit have ordered ... [and] is a prudent and reasonable means of implementing these requirements." WorldCom Exh. 31, Rebuttal Test. of Harthun and Peterson at 6. The detail in WorldCom's proposed language merely specifies how the legal obligations will be implemented, and what the consequences will be if Verizon fails to live up to those obligations. See WorldCom Exh. 16, Direct Test. of Harthun and Peterson at 11. Providing such detail is well within this Commission's broad grant of authority to "resolve each issue set forth in the petition [for arbitration] ... by imposing appropriate conditions as required to implement subsection (c) of this section." 47 U.S.C. § 252(b)(4)(C); see also Local Competition Order ¶¶ 135, 137 (noting that state commissions will often be called upon to "define specific terms and conditions governing access to unbundled elements," and make "critical decisions concerning a host of issues."). The inclusion of language that explains how these requirements will be implemented is also consistent with the positions that Verizon has taken elsewhere in the interconnection agreement; for example, Verizon has demanded that WorldCom include similar language to indemnify Verizon if WorldCom fails to comply with its regulatory obligation to examine the eligibility of

WorldCom's customers for Lifeline/Link-Up services. See Attachment II (Resale), section 2.2.3; see also Tr. 10/12/01 at 2098-99 (Harthun, WorldCom).

Verizon's claim that WorldCom is attempting to require more than its "best efforts" and make it a guarantor for WorldCom also misses the mark. As explained above, WorldCom's proposed language applies only if Verizon fails to use its best efforts to negotiate a license. WorldCom does not require Verizon to guarantee the outcome of those negotiations, and has simply proposed a remedial protection in the event that Verizon does not comply with its legal duty to engage in "best efforts" negotiation. See WorldCom Exh. 16, Direct Testimony of Harthun and Peterson at 13.

Finally, Verizon's proposed language does not adequately address WorldCom's concerns. Although Verizon's language indicates that Verizon will notify WorldCom of any restrictions and use its best efforts to procure licenses, it does not provide the incentives that are articulated in the WorldCom language. See id. Moreover, Verizon's proposed language delays negotiations over license rights until a point at which the breach is pending or threatened. See id. at 13-14. This suggests that Verizon will not use its best efforts to negotiate license extensions until legal action by the third party vendor is imminent, and is wholly inconsistent with the UNE Licensing Order and the Fourth Circuit's opinion. See id. at 14. This approach is also inconsistent with the standard means of addressing intellectual property matters in commercial agreements. See id.

In sum, the Commission should order the inclusion of WorldCom's proposed Part A, Section 20.2, in the interconnection agreement because WorldCom's proposal is consistent with, and a reasonable means of implementing, applicable law.

Issue IV-107 (Intellectual Property Of Each Party)

The interconnection agreement should contain a provision that makes clear that the agreement does not itself create or modify the parties' intellectual property rights, and provides that when one party interconnects with the other or leases a portion of the network from the other, the lessee only obtains a limited right to use the intellectual property owned by the lessor. WorldCom's proposed language, which is a combination of WorldCom's initial proposal and the AT&T-Verizon language, accomplishes these goals and is "typical of agreements involving the use of technology." WorldCom Exh. 16, Direct Test. of Harthun and Peterson at 15. Moreover, WorldCom's proposed language lessens any ambiguity regarding ownership or license rights that might otherwise arise, thereby reducing the likelihood of subsequent disputes regarding the agreement's grant of intellectual property rights. See id. Verizon's testimony does not address the narrow issue presented by Issue IV-107, and instead conflates this issue with issue III-15. This issue is quite different from Issue III-15, however, because Issue IV-107 addresses "the continuing ownership of each party's intellectual property rights [and] does not purport to address the ownership, licensing or negotiation of intellectual property rights from third parties." See WorldCom Exh. 31, Rebuttal Test. of Harthun and Peterson at 9-10. Because Verizon has failed to offer any substantive criticism of WorldCom's proposed language, the Commission should adopt WorldCom's proposed compromise language.

The language that appears at section 28.16.1 of the AT&T/Verizon agreement does not adequately implement the principles discussed above. At the outset, Verizon's proposed language appears to contemplate that the parties will enter into a separate

agreement to address their license to use each other's intellectual property. See WorldCom Exh. 16, Direct Test. of Harthun and Peterson at 16. It would be inappropriate, and contrary to standard practice, to require the parties to engage in separate negotiations to determine and define the rights of use concerning intellectual property that is "property necessary or appropriate to the very carrying out of the transaction" at issue. Id. Common sense dictates that the agreement should establish such terms. See WorldCom Exh. 31, Rebuttal Test. of Harthun and Peterson at 12. Moreover, Section 28.16.1 improperly strips WorldCom of any right to use Verizon intellectual property, even if such use is consistent with the interconnection agreement. See id. It would be more appropriate to allow WorldCom a limited-use license consistent with the interconnection agreement. See id.

In sum, the Commission should order the inclusion of WorldCom's proposed contract language, and reject Verizon's proposed section 28.16.1.

Issue IV-129 (Definitions)

The Interconnection Agreement should contain a section that defines the terms that are used in the Agreement. A definitions section would facilitate reading of the Agreement and provide a reference to which the parties may consult to obtain the meaning of a given term used in the Agreement. See WorldCom Exh. 16, Direct Testimony of M. Harthun at 6. WorldCom's preferred definition section appears at Part B of the WorldCom proposed interconnection agreement. Although Verizon apparently agrees that a definitions section should be included in the agreement, it asserts that deferral is necessary because the parties will be unable to agree on the definitions section until the other arbitration issues are resolved. See id.; see also Verizon Exh. 13, Direct Test. General Terms and Conditions at 36. In addition, Verizon states that it disagrees with some of WorldCom's proposed definitions. For the reasons set forth below, Verizon's position is meritless.

The Commission should reject Verizon's proposal that the definitions section be deferred until the arbitration has been completed for several reasons. Instead, the Commission should address the definition of any specific terms used within the interconnection agreement as part of its resolution of the substantive issue and the adoption of contract language where the specific defined term is used. If the definition of a term depends on the resolution of a dispute between the parties, the Commission should simply define the terms in a manner that complies with the decision it will render. In the absence of a specific definition the interconnection agreement should rely on the meaning of a specific term as it is used/defined in the Act, the FCC's rules and orders, or the industry at large. See id. at 7. Alternatively, the Commission could simply leave a

disputed term out of the definitions section, and allow the parties to draw the term's meaning from the substantive provision addressing that issue.[117] More generally, Verizon's proposal that the Commission defer ruling on the proposed definitions (as a second round of decision-making) could cause the post-arbitration contract formation process to "stall indefinitely as the parties attempt to negotiate and seek agreement on the definitions section at that stage." Id.

In sum, there is no reason to allow the definitions section to hold up the entire Agreement. Because "[a]ny delay in defining terms ... will likely cause the parties to commence a time-consuming and contentious post-arbitration contract formation process," WorldCom Exh. 30, Rebuttal Test. of M. Harthun at 6, the Commission should include a Part B containing definitions when it issues the remaining provisions of the interconnection agreement, and should adopt the definitions that WorldCom has proposed.

[117] However, as Mr. Harthun has explained, that approach is "rife with difficulties," and would deprive the interconnection agreement of the clarity and precision, both of which are critical.